

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/19/12

DEPT. 50

HONORABLE JOHN L. SEGAL

JUDGE

I. FLORES

DEPUTY CLERK

HONORABLE
5

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

E. AVENA, C/A

Deputy Sheriff

C. LUDWIG, CSR #13017

Reporter

8:31 am

BC422252

Plaintiff

GREGORY W. SMITH (X)

Counsel

WILLIAM TAYLOR

VS

Defendant

ROBERT J. TYSON (X)

Counsel

CITY OF BURBANK

RECUSAL-GREEN

170.6-ROLF M. TREU

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT CITY OF BURBANK TO TAX COSTS;

Motion as captioned above, is called for hearing and held.

The Court issues a written tentative ruling in this matter.

The Court hears from counsel. After hearing from counsel, the Court takes the matter under submission.

Notice is waived.

LATER, OFF THE RECORD AND OUTSIDE THE PRESENCE OF COUNSEL:

The Court rules on above captioned submitted motion as follows:

For the reasons stated in the Court's Ruling on Submitted Matter filed this date under separate cover, the Court rules as follows:

The City's motion to tax costs is granted in part and denied in part. Taylor may recover \$8,939.49 in costs, as follows:

Cost Item Description

Amount

CITY ATTORNEY
2012 JUN 21 PM 4:11

4/19

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/19/12

DEPT. 50

HONORABLE JOHN L. SEGAL

JUDGE

I. FLORES

DEPUTY CLERK

HONORABLE
5

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

E. AVENA, C/A

Deputy Sheriff

C. LUDWIG, CSR #13017

Reporter

8:31 am BC422252

Plaintiff GREGORY W. SMITH (X)
Counsel

WILLIAM TAYLOR
VS
CITY OF BURBANK

Defendant ROBERT J. TYSON (X)
Counsel

RECUSAL-GREEN
170.6-ROLF M. TREU

NATURE OF PROCEEDINGS:

1 Filing and motion fees	\$ 695.00
2 Jury Fees	\$ 1,264.44
4 Deposition Costs	\$ 5,472.80
5 Service of process	\$ 380.00
8 Witness fees	\$ 849.92
11 Models, blowups, and photocopies of exhibits	\$ 280.33
13 Other	\$ 0.00
=====	
TOTAL:	\$ 8,939.49

The clerk gives notice. A conformed copy of the Court's Ruling on Submitted Matter is sent along with a copy of this minute order.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the minute order dated: 6/19/12 and a conformed copy of Ruling on Submitted Matter filed on 6/19/12, upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/19/12

DEPT. 50

HONORABLE JOHN L. SEGAL

JUDGE

I. FLORES

DEPUTY CLERK

HONORABLE
5

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

E. AVENA, C/A

Deputy Sheriff

C. LUDWIG, CSR #13017

Reporter

8:31 am

BC422252

Plaintiff
Counsel

GREGORY W. SMITH (X)

WILLIAM TAYLOR
VS
CITY OF BURBANK


Defendant
Counsel

ROBERT J. TYSON (X)

RECUSAL-GREEN
170.6-ROLF M. TREU

NATURE OF PROCEEDINGS:

Dated: June 20, 2012
John A. Clarke, Executive Officer/Clerk

By: 
I. Flores, Deputy Clerk

GREGORY W. SMITH
LAW OFFICES OF GREGORY W. SMITH
9100 Wilshire Boulevard, Suite 345E
Beverly Hills, CA 90212

CHRISTOPHER BRIZZOLARA
1528 16th Street
Santa Monica, CA 90404

LINDA MILLER SAVITT
BALLARD ROSENBERG GOLPER & SAVITT, LLP
500 North Brand Boulevard, 20th Floor
Glendale, CA 91203

RONALD F. FRANK
ROBERT J. TYSON
BURKE, WILLIAMS & SORENSSEN, LLP
444 S. Flower Street, 24th Floor
Los Angeles, CA 90071

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/19/12

DEPT. 50

HONORABLE JOHN L. SEGAL

JUDGE

I. FLORES

DEPUTY CLERK

HONORABLE
5

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

E. AVENA, C/A

Deputy Sheriff

C. LUDWIG, CSR #13017

Reporter

8:31 am

BC422252

Plaintiff
Counsel

GREGORY W. SMITH (X)

WILLIAM TAYLOR
VS
CITY OF BURBANK

Defendant
Counsel

ROBERT J. TYSON (X)

RECUSAL-GREEN
170.6-ROLF M. TREU

NATURE OF PROCEEDINGS:

✓
CAROL A. HUMISTON
CITY OF BURBANK
275 East Olive Avenue
P.O. Box, 6459
Burbank, CA 91510

RULING ON SUBMITTED MATTER

DEPT. 50

JUNE 19, 2012

**CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court**

**TAYLOR v. CITY OF BURBANK, ET AL.
CASE NO. BC422252**

JUN 19 2012

John A. Clarke, Executive Officer/Clerk
BY L. FLORES

PLAINTIFFS' MOTION TO TAX COSTS

I. Introduction

Plaintiff William Taylor alleged causes of action for retaliation in violation of (1) Labor Code section 1102.5 and (2) the FEHA, for reporting discrimination and sexual harassment within the Burbank Police Department. The jury found in favor of Taylor and awarded \$1,048,579 in economic damages and \$250,000 in non-economic damages. Because Taylor obtained a net monetary recovery, he is the prevailing party and is entitled to recover his costs as a matter of right. See Civ. Proc. Code § 1032(b). Taylor filed a memorandum of costs on April 27, 2012, seeking to recover nearly \$50,000 in eight categories of costs. The City of Burbank moves to tax seven of the eight categories of costs.

The right to costs is governed strictly by statute, and a court has no discretion to award costs that are not statutorily authorized. Ladas v. California State Automotive Assoc., 19 Cal. App. 4th 761, 773-74 (1993). The City of Burbank, as the non-prevailing party, may dispute any or all of the items in Taylor's memorandum of costs by a motion to strike or tax costs. Rule 3.1700(b), California Rules of Court. Some costs are specifically allowable as a matter of right. Civ. Proc. Code § 1033.5(a). Others are expressly prohibited. Id., § 1033.5(b). Those costs not mentioned in section 1033.5 are left to the court's discretion. Id., § 1033.5(c)(4). But all "allowable costs" must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation, and must be reasonable in amount. Id., §§ 1033.5(c)(2)-(3). If the items appearing in a cost bill appear proper, then the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. Ladas, 19 Cal. App. 4th at 773-74. Once the moving party has objected to the costs, then the burden of proof is on the party claiming the costs. Id. Whether a cost item was reasonably necessary to the litigation is a question of fact. Id.

II. Discussion

A. Filing and Motion Fees

The City moves to tax \$579.87 of the total \$1,274.87 Taylor claims in Item No. 1 for "filing and motion" fees. The City of Burbank primarily challenges whether Taylor may recover the cost of messenger and "attorney service" fees. The chart below summarizes the eleven charges that the City contests:

1	3/5/2010 Messenger Filing Fee (Pitchess & Discovery Motions)	\$165.75
2	4/14/2010 Fax Filing Fee to Reply	\$16.50
3	6/4/2010 Messenger Filing Fee (Gov't Claim)	\$53.50
4	6/9/2010 Messenger Filing Fee	\$154.12
5	8/25/2010 Attorney Service to File Opposition (to Pitchess Rehearing)	\$20.00
6	10/29/2010 Attorney Service to File Objections	\$15.00
7	11/3/2010 Filing Fee for Ex Parte Hearing on 11/4/2010	\$40.00
8	5/25/2011 Fax Filing Fee (Joint Status Report)	\$10.50
9	12/23/2011 Attorney Service to File Opposition (to Augment)	\$20.00
10	2/15/2012 Attorney Service to File Opposition (to motions in limine)	\$64.50
11	3/2/2012 Attorney Service Fee to File List of Stipulated Facts	\$20.00
		<hr/> <hr/>
		\$579.87

Most of these costs are for a messenger service to file documents in this case (Line Items 1-2, 4-6, 7-11). The court has discretion to find that such costs are recoverable, if Taylor shows that these costs were incurred, are reasonable in amount, and were reasonably necessary to the conduct of this litigation. See Civ. Proc. Code § 1033.5(c)(1)-(4); see Ladas, 19 Cal. App. 4th at 776. But he hasn't. Taylor has merely submitted a list of the charges he claims. See Smith Decl., ¶ 3 ("Attached . . . is a list of each of the items claimed specifying the description of the type of fee and the document or documents that were filed with the court"); Exh. 1. Taylor has not submitted evidence that these charges were incurred, either by way of Smith's declaration or by submitting a copy of an invoice. See Civ. Proc. Code § 1033.5(c)(1). Smith does not make any effort to explain why he used a messenger service, or why a messenger service was "reasonably necessary to the conduct of the litigation." Smith Decl., ¶ 3; Exh. 1. On their face, the messenger service costs generally appear "reasonable in amount," except for two charges for \$165.75 and \$154.12, which are much higher than the other messenger service costs (and without explanation). See Civ. Proc. Code § 1033.5(a)(3). But the City has properly objected to Item 1, which includes costs in addition to costs for filing and motion fees for messenger service fees, and Taylor has failed to carry his burden. The City's Motion to tax the messenger fees (Chart Line Items 1-2, 4-6, 7-11) is granted.

Line Item 3 is the messenger service cost to file a government claim with the City of Burbank. Taylor cites no authority stating that the plaintiff's cost to file a government claim with a public entity is a "filing, motion, or jury fee" which is recoverable under Code of Civil Procedure section 1033.5(a)(1). Taylor implicitly concedes that the cost is not recoverable under section 1033.5(a)(1), arguing that filing a government claim is a prerequisite to filing a lawsuit under Labor Code section 1102.5. Opposition, 3:28-4:2. But Taylor cites no authority that costs to satisfy the tort claims act are recoverable costs, even under the discretionary provision. See Civ. Proc. Code § 1033.5(c)(4). And again, Taylor has not submitted evidence showing that or when the claimed \$53.50 was actually incurred to file his government claim. The City's Motion to tax Chart Line Item 3 is granted.

Chart Line Item 7 is a \$40 filing fee, presumably for an ex parte application which, according to Smith's chart, the court heard on November 4, 2010. The court file, however, contains no record of any ex parte hearing heard on November 4, 2010, or of any document filed by plaintiff on November 4, 2010. Taylor again has failed to carry his burden to show that this cost was incurred, is reasonable in amount, and was reasonably necessary to the conduct of this litigation. The City's Motion to tax line item 7 is granted.

In sum, the City's motion to tax \$579.87 from Item 1, for filing and motion fees, is granted. Taylor may recover \$695 under Item 1, the amount claimed by Taylor to which the City has not objected.

B. Jury Fees

Taylor seeks to recover \$1,261.44 in jury fees in Item 2. Memorandum of Costs, ¶ 2. The City objects that Taylor has only listed three charges under Item 2, which add up to \$1,024.96, and not \$1,261.44, a difference of \$236.48.¹ Taylor responds with the declaration of his attorney, Smith, who states that he inadvertently failed to list a \$236.48 jury fee deposit for March 16-19, 2012. Smith Decl., ¶ 4. Smith adds that Exhibit 2 attached to his declaration "is a complete list which reflects all the jury fees paid by me in this matter." Id. Jury fees are recoverable. Civ. Proc. Code §§ 1033.5(a)(1)-(2). Smith states that he paid all of the jury fees claimed, in the total amount of \$1,261.44. Smith Decl., ¶ 4; Civ. Proc. Code § 1033.5(c)(1). The court finds the jury fees were reasonable in amount and were reasonably necessary for the conduct of the litigation, given that this case was a jury trial. Id., § 1033.5(c)(2)-(3). The City's motion to tax Item 2 is denied. Taylor may recover the \$1,261.44 claimed on Item 2.

¹ Thus, the parties are fighting over \$236.48. Really?

C. Deposition Costs

Taylor seeks to recover \$5,472.80 for six depositions (Murphy, Magnante, Gardiner, Ramos, Stehr, and Flad). Memorandum of Costs, ¶ 4. The City argues that the cost to videotape Magnante's deposition (\$538.20) is unreasonably high, because the cost to videotape Murphy's deposition (\$180) was so much lower. Motion, 4:5-12. The City adds that Magnante did not testify at trial. *Id.*, 4:12-13. Therefore, the City moves to tax \$338.20 of the total \$538.20 claimed for videotaping Magnante's deposition. *Id.*, 4:14-16. The cost of "[t]aking, video recording, and transcribing necessary depositions including an original and one copy" is expressly recoverable. Civ. Proc. Code § 1033.5(a)(3). Smith explains that the cost of Magnante's deposition was much higher than Murphy's because "the videographer [for Murphy] was dismissed by the parties and the cost of \$180.00 was the set-up cost." Smith Decl, ¶ 5. Smith also submits a copy of a \$598 invoice, explaining that he negotiated a 10% discount. *Id.*, ¶ 5; Exh. 3. On reply, the City argues that the charges for \$105 for DVD copies and \$30 for hard drive storage were not "necessary." Reply, 4:3-9.² By its silence, the City concedes that Magnante's deposition was a "necessary deposition." Civ. Proc. Code § 1033.5(a)(3).

The City's motion is denied. The fact that the deposition was not used at trial does not mean that \$135 for a DVD copy was not necessary. See Seever v. Copley Press, Inc., 141 Cal. App. 4th 1550, 1557 (2006); Chaaban v. Wet Seal, Inc., 203 Cal. App. 4th 49, 57 (2012) ("recovery of deposition costs does not depend on whether the deponent ultimately testifies at trial."). "The standard is whether the cost is "reasonably necessary to the conduct of the litigation" under section 1033.5(c)(2). Here, given that the City does not argue that Magnante's deposition was unnecessary, the question is whether the \$135 in charges were "reasonably necessary." The time to videotape the deposition for 4.5 hours at \$100 per hour was \$450, and the cost for a copy of the deposition was \$105. Smith Decl., Exh. 3. The cost to take and make one copy a deposition is recoverable. Civ. Proc. Code § 1033.5(a)(3). The \$30 cost to archive the footage, though not expressly recoverable, was incurred (as shown by the invoice), is a reasonable amount, and was reasonably necessary for the conduct of the litigation, to ensure that copies would remain obtainable by all parties, come what may. *Id.*, § 1033.5(c)(1)-(4).

Taylor may recover \$5,472.80 for Item 4, for deposition costs, as claimed.

D. Service of Process

In Item 5, Taylor seeks to recover \$1,270 in service of process costs. Memorandum of Costs, ¶ 5. The City moves to tax each line item within Item 5 where Taylor lists the cost under the "other" category rather than under the "registered

² Thus, the parties are fighting over \$135. Really??

process" category, and does not specify what the charge is for. Motion, 4:27-5:13. The City also argues that the \$90 to serve Tim Stehr is not recoverable because the City agreed to accept service for Stehr. Id., 4:18-21. Finally, the City moves to strike the \$40 cost to serve Solomon Gresen, a firm representing other police officers against the City in other lawsuits. Id., 4:22-26.

The motion to tax the service of process costs incurred to serve Stehr and Gresen (a \$130 issue) is denied. Smith explains that he attempted to serve Stehr with a trial subpoena before opposing counsel agreed to accept service for Stehr. Smith Decl., ¶ 6; Exh. 4. Costs for service of process are recoverable. Civ. Proc. Code § 1033.5(a)(4). And although Gresen may be counsel for other officers in another lawsuit, Smith states that he subpoenaed deposition transcripts from that case, believing that they were subject to a protective order. Smith Decl., ¶ 7. Such costs are, again, recoverable under section 1033.5(a)(4). The City cites no authority for its argument that Taylor is not able to recover service of process costs incurred in this case, merely because Gresen is counsel for other plaintiffs in another case.

The motion to tax the "other" costs claimed within Item 5 is granted. In opposition to the motion, Taylor submits evidence showing that all "other" charges within Item 5 are for federal express and messenger charges for discovery requests and responses, as well as opposition and reply papers for motions. Smith Decl., ¶ 6-8; Exh. 6. Federal Express charges, like postage charges, are not recoverable. See Ripley v. Pappadopoulos, 23 Cal. App. 4th 1616, 1627-28 (1994).

There are also eight "messenger express" charges included in Exhibit 6, which amount to \$304.24. As noted, messenger costs are discretionary. Civ. Proc. Code §§ 1033.5(c)(1)-(4); see Ladas, 19 Cal. App. 4th at 776. Taylor, however, provides no explanation for why it was "reasonably necessary" for him to send these documents by messenger, or why the City should be forced to bear the cost of Taylor's choice. The documents sent by messenger include:

6/15/2009 Notice that Taylor's DFEH Case Closed	\$29.00
4/16/2010 Taylor's Skelly Response	\$38.50
8/25/2010 Pitchess Motions to Police Department	\$38.50
8/25/2010 Pitchess Motions to Burbank City Attorney	\$20.00
8/25/2010 Pitchess Motions to Burke Williams Sorenson	\$59.00
10/7/2011 Discovery Requests to Police Department	\$40.62
10/7/2011 Discovery Requests to Burbank City Attorney	\$30.00
10/7/2011 Discovery Requests to Burke Williams Sorenson	<u>\$48.62</u>
	\$304.24

These documents could have been sent by mail, or by Federal Express. In either case, the cost to send the documents would not be recoverable. Civ. Proc. Code

§ 1033.5(b)(3). The same rule applies to documents sent by messenger, where there is no apparent reason to incur the higher cost. Ripley, 23 Cal. App. 4th at 1627-28.

The City's motion to tax all of the "other" costs accounted for in Smith's Exhibit 6 is granted, for a total of \$890. Taylor may recover \$380 in costs for Item 5.

E. Witness Fees

Taylor seeks to recover \$849.92 in ordinary witness fees, and \$29,615 in expert witness fees, for a total of \$30,464.92 in witness fees in Item 8. The City argues that the recovery of expert witness fees by the prevailing party in a FEHA case under Government Code section 12965(b) must be by a motion, not by a memorandum of costs. See Anthony v. City of Los Angeles, 166 Cal. App. 4th 1011, 1016 (2008). Taylor concedes the point, and withdraws his request for expert fees from his memorandum of costs. Opposition, 6:16-17. The City's motion to tax the entirety of expert witness fees Taylor claims in Item 8, in the amount of \$29,615, is unopposed and granted. Taylor may recover \$849.92 on Item 8 for ordinary witness fees, which the City has not challenged.

F. Exhibits

A prevailing party may recover costs for "models and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact." Civ. Proc. Code § 1033.5(a)(13). "On its face this statutory language excludes as a permissible item of costs exhibits not used at trial, which obviously could not have assisted the trier of fact." Seeever, 141 Cal. App. 4th at 1558. The City argues that plaintiff only submitted 155 pages of trial exhibits, yet seeks to recover the cost of copying 1,422 pages. Motion, 9:3-12. Taylor vaguely opposes the motion, arguing that he made an unspecified number of duplicates. Opposition, 6:20-7:3.

The City's motion to tax Item 11 is granted. The City asserts that only 155 pages of these exhibits were admitted at trial, which is a little less than 11% of 1,422 pages. Only exhibits used at trial can assist the trier of fact, and only those costs for exhibits which were reasonably helpful to aid the trier of fact are recoverable. Seeever, 141 Cal. App. 4th at 1558. Taylor does not argue how many more pages were reasonably helpful to aid the trier of fact, or cite authority showing that the cost for exhibits not used at trial is recoverable. 11% of the claimed \$2,548.47 is \$280.33. The City's motion to tax Item 11, seeking \$2,548.47 in costs for exhibits, is granted in part. Taylor may recover \$280.33.

G. Other

Taylor seeks to recover \$3,315.78 in Item 13. The costs sought in this category include:

1. Messenger Fees	\$186.00
2. Transcriptionist re IA Interviews	\$1,499.50
3. Court Reporter Transcripts	\$52.00
4. CourtCall	\$216.00
5. LASC Online	\$7.50
6. Federal Express	\$54.78
7. Interpreter & Certification Fees	<u>\$1,300.00</u>
	\$3,315.78

The City moves to tax each of the 7 components of the "other" costs item. Taylor concedes that the cost of transcripts not ordered by the court are not recoverable. See Civ. Proc. Code § 1033.5(b)(5); Opposition, 7:10. Taylor argues however, that the messenger and federal express fees, court call charges, LASC online charges, and IA Interviews and interpreter fees should be recoverable in the court's discretion.

Smith does not state in his declaration anything about whether the costs claimed in Item 13 for messenger and federal express fees, courtcall charges, or LASC online charges, were actually incurred, or what these charges were incurred for in relation to this litigation. Smith Decl., ¶ 10. The court cannot make the findings required under sections 1033.5(c)(1)-(3), and therefore cannot exercise its discretion to award line items 1, 3, 4, 5, or 6 within Item 13 under section 1033(c)(4). Therefore, Taylor has failed to carry his burden with respect to these components of Item 13. Ladas, 19 Cal. App. 4th at 773-74. The City's motion to tax line items 1, 3, 4, 5, or 6 within Item 13 is granted.

The City also moves to tax the \$1,499.50 Taylor paid to transcribe certain "IA Interviews" and \$1,300 to translate the interviews from Spanish to English. The City argues that these transcripts were not received in evidence, and were not reasonably necessary to the conduct of the litigation. Motion, 10:5-16. Taylor responds that the IA Interviews were "not admitted over a hearsay objection" but were used to refresh recollection and were important for counsel's "understanding of the case." Smith Decl., ¶ 10.

Taylor has shown that the cost transcribing and translating the IT witness statements were incurred and "reasonably necessary" within the meaning of sections 1033.5(c)(1)-(2) because they provided counsel with "an understanding of what was said by the Latino witnesses that claimed they were attacked," even if the transcripts themselves were not admissible at trial. Smith Decl., ¶ 11. The cost to transcribe witness statements from an IA Investigation is not an "allowable cost," however, because it is best described as an "[i]nvestigation expense[]" in preparing the case for trial." Civ. Proc. Code § 1033.5(b)(2). Such costs, like costs for legal research, are "not compensable as costs in the absence of an agreement of the parties or statutory authority," even if they were incurred and were reasonably necessary. Ladas, 19 Cal.

App. 4th at 776. The City's motion to tax Item 13 is granted.

III. Disposition

The City's motion to tax costs is granted in part and denied in part. Taylor may recover \$8,939.49 in costs, as follows:

Costs Item Description	Amount
1 Filing and motion fees	\$695.00
2 Jury fees	\$1,261.44
4 Deposition Costs	\$5,472.80
5 Service of process	\$380.00
8 Witness fees	\$849.92
11 Models, blowups, and photocopies of exhibits	\$280.33
13 Other	<u>\$0.00</u>
Total	<u>\$8,939.49</u>

The clerk will give notice.